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**IN THE HIGH COURT OF JUDICATURE AT BILASPUR CHHATTISGARH**

**S.A. NO.** 56 **/ 2006** **Single Bench**

**APPELLANT PLAINTIFF** : Kunwar Sai, Aged about 50 years, S/o. Gholtu, R/o. Village Sahanpur, P.S. & Tahsil Lundra (Dhaurpur), District Surguja (CG)

**VERSUS**

**RESPONDENTS DEFENDANTS** : 1] Baiya Bai, Aged about 40 years, D/o. Gorakhnath, R/o. Village Sahanpur, P.S. & Tahsil Lundra (Dhaurpur), District Surguja (CG)

2] State of Chhattisgarh, Through: Collector, Surguja, Ambikapur, Chhattisgarh.

P.R. No. 283/06
Presented by Shri V. R. Baranwal
dated 09/2/06

**SECOND APPEAL UNDER SECTION 100 OF CIVIL PROCEDURE CODE**

DY 06

XI-HC-22

AFR.

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**आदेश पत्रक**

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**29.8.2006**

Shri Manoj Paranjape, counsel for the appellant.

Arguments on admission heard.

Order dictated as follows:

**ORAL ORDER**
**(29.8.2006)**

This is the plaintiff's appeal, filed under Section 100 of the Code of Civil Procedure. It arises out of judgment and decree dated 11.11.2005, passed by the First Additional District Judge, Surguja, Ambikapur in Civil Appeal No.4-A/2005, arising out of judgment and decree dated 30.12.2004, passed in Civil Suit No. 70-A/2004 by the Vth Civil Judge Class-II, Ambikapur(CG).

The brief facts are that the plaintiff, appellant herein, filed a suit for declaration of title and also for possession in relation to the suit lands, described in Schedule-A of the plaint. The plaint allegations are that the suit lands were the self-acquired properties of one Jagannath Gond, on whose name, a settlement *patta* was prepared. Jagannath Gond was issueless. He had taken the plaintiff as his son from the plaintiff's father in the childhood of the plaintiff and had kept the plaintiff with him as his son and the plaintiff resided with Jagannath as his son till his lifetime. It is the case of plaintiff that after the death of Jagannath, the property was succeeded by his wife namely-Smt. Bhokhi. It

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is further pleaded by the plaintiff that Bhokhi executed an unregistered Will-deed dated 22.1.1989 (Ex.P-1) in favour of plaintiff declaring him to be the owner of her entire property after her death. Bhokhi died on 25.1.1997 and after her death, the plaintiff became the owner of entire property, which was originally belonging to Jagannath. The cause of action arose when the defendant, who is the daughter of real brother of Jagannath, claimed the properties as the successor thereof.

The defendant resisted the claim of the plaintiff. It was pleaded by her that the plaintiff was never adopted as his son by Jagannath. Since he falls in remote relation of Jagannath, he was only looking after the agricultural works of Jagannath alongwith him. She denied the plaintiff to be the adopted son of Jagannath. She also denied the valid execution of the Will.

Learned trial Court framed various issues in this case and vide issue No.1-a and b, held that the plaintiff was the adopted son of Jagannath. Vide issue No.2, it further held that the wife of Jagannath namely-Bhokhi had executed a Will-deed in favour of the plaintiff and by virtue of this document also, he becomes the absolute owner of the suit lands.

Against the aforesaid judgment and decree, passed by the trial Court, the defendant filed a First Appeal before the

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lower appellate court. The lower appellate court allowed the appeal and reversed the findings recorded by the trial Court. So far as the finding in relation to adoption is concerned, the lower appellate court said that there was no such plea of adoption, raised by the plaintiff in the plaint, therefore, no amount of evidence, pertaining to adoption was required to be looked into by the trial Court and the finding in relation to adoption is not in accordance with law. About the finding of Will, it said vide para 26 that only one witness, shown to be the attesting witness of the Will namely-Pitambar (PW-1) was examined by the plaintiff in the trial Court. This witness has only said that a Will was executed by Bhokhi in favour of the plaintiff and Bhokhi had put her thumb impression on the document (Will dated 22.1.1989, Ex.P-1). He also proved his own signature on the Will. The first appellate court said that the valid execution of the Will in accordance with the provisions of Section 63 of the India Succession Act and Section 68 of the Indian Evidence Act has not been proved.

Learned counsel for the appellant submits that the reversing finding in relation to valid execution of Will is not in accordance with law. His submission is that as per the evidence of PW-1, who is one of the attesting witnesses, the Will was validly proved and the trial Court erred in law in

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holding that the same was not proved in accordance with the above provisions of law.

It has been held in the matter of **Girja Datt Singh Vs. Gangotri Datt, AIR 1955 SC 346** that in order to prove the due attestation of the Will, the propounder of Will has to prove that the two witnesses saw the testator, sign the Will and they themselves signed the same in the presence of the testator. In the matter of **H.Venkatachala Iyengar Vs. B.N. Thimmajamma and others AIR 1959 SC 443**, it has been held by the Apex Court that the party propounding a Will or otherwise making a claim under a Will, is no doubt seeking to prove a document and, in deciding how it is to be proved, reference must inevitably be made to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These

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provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Thus, the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. It would prima facie be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by S.63 of the India Succession Act. As in the case of proof of other documents so in the Will it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters. It has been again held by the Apex Court in the matter of **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, 2003 (1) C.G.L.J.190** that on a combined reading of Section 63 of the Succession Act with section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the Will was duly and validly executed. That cannot be done by simply proving that the signature on the Will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. The Apex Court further held that it is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to

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be called for proving due execution of the will as envisaged in section 63.

In the instant case, though, the said witness says that he had put his signature on the Will, Ex.P-1 and the testator had also put her thumb impression, but only such statement, does not dispense with the responsibility of legal requirement to prove a Will under the provisions of Section 63 of the Indian Successions Act and Section 68 of the Evidence Act. And in the facts and circumstances of the case, the first appellate court has rightly held that the due and valid execution of the Will was not proved and it has rightly reversed the finding recorded by the trial Court.

Shri Paranjape has not pressed this appeal on the point of adoption as he admits that in fact, there was no pleading in relation to adoption by the plaintiff in the plaint and the first appellate court has rightly rejected the finding of adoption also, for want of proper pleadings in this regard.

In the opinion of this Court, there appears to be no substantial question of law, involved in this appeal and the appeal is not worth admission. The same is dismissed summarily at the motion stage itself. There shall be no order as to cost.

**Sd/-**
**Sunil Kumar Sinha**
**Judge**

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(पीछे देखिये)